No. 15-493

In The
Supreme Court of the United States

MELENE JAMES,

Petitioner,

v.

CITY OF BOISE, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, STEVEN BONAS, STEVEN BUTLER, AND TIM KUKLA,

Respondents.

On Petition For A Writ Of Certiorari To The Idaho Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents do not defend the Idaho Supreme Court's holding that, in awarding attorney's fees under 42 U.S.C. § 1988, it is not bound by this Court's decisions interpreting that statute. Indeed, respondents acknowledge the broad principle that, "[d]espite the Idaho Supreme Court's holding to the contrary, state courts are bound by this Court's interpretation of a federal statute." Br. in Opp. 3. Accordingly, respondents also acknowledge that, under this Court's decisions in *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Idaho Supreme Court could award attorney's fees against petitioner under § 1988 only if her appeal of her excessive-force claims was "frivolous, unreasonable, or without foundation." *Hughes*, 449 U.S. at 14 (quoting *Christiansburg*, 434 U.S. at 421). Most significantly, respondents concede that "summary disposition may be appropriate" (Br. in Opp. 2) if the Idaho Supreme Court failed to apply the *Christiansburg/Hughes* standard based on its deliberate disregard of this Court's precedent.

Respondents nonetheless oppose certiorari on the ground that, in the end, the Idaho Supreme Court *did* apply the *Christiansburg/Hughes* standard in this case. Br. in Opp. 2, 3, 6 & 22. But that is simply not a tenable reading of the Idaho Supreme Court's opinion. And even if it were, further review would be warranted because the Idaho Supreme Court departed from this Court's precedent by relying on respondents'

qualified immunity to award fees against petitioner under § 1988.

1. Respondents assert that the Idaho Supreme Court applied the *Christiansburg/Hughes* standard after declaring that it was not bound by this Court's decisions in *Christiansburg* and *Hughes*. Br. in Opp. 2, 3, 6 & 22. To accept that reading, one must ignore three things that are obvious on the face of the court's opinion:

a. The court concluded that it did not have to use the *Christiansburg/Hughes* "frivolous, unreasonable, or without foundation" standard in ruling on respondents' fee request under § 1988 because that standard was "not contained in the statute" (App. 55).

b. The court did not, in fact, use the *Christiansburg/Hughes* standard in explaining why it was granting respondents' fee request under § 1988 (App. 55-56).

c. The court *did* use a standard identical to the *Christiansburg/Hughes* standard in explaining why it was *denying* respondents' fee request under Idaho Code § 12-121. *See* App. 56 ("Because the appeal regarding the Plaintiff's claims under state law was not brought or pursued frivolously, unreasonably, or without foundation, we will not award attorney fees under that [Idaho] statute.").

Given these features, one cannot reasonably read the opinion below to mean that, after forthrightly (and *sua sponte*) concluding that it was not bound to apply the *Hughes/Christiansburg* standard, the Idaho Supreme Court applied that standard – but did so covertly – after all.

Such a reading is all the more unsustainable when one examines the two prior cases in which the Idaho Supreme Court has applied the *Christiansburg/Hughes* standard. In *Nation v. State, Dep't of Correction*, for example, the Idaho Supreme Court applied the *Christiansburg/Hughes* standard in this straightforward passage:

> 42 U.S.C. § 1988 allows courts to award the prevailing party attorney fees in actions seeking to enforce section 1983 claims. Since the [plaintiffs in this § 1983 action] . . . do not prevail on their civil rights claims, they are not entitled to attorney fees. . . . However, their appeal was not 'unreasonable, frivolous, meritless, or vexatious,' [quoting Ninth Circuit precedent ultimately traceable to *Christiansburg*], so [defendants also] are not entitled to attorney's fees.

158 P.3d 953, 970 (Idaho 2007). One finds a nearly identical passage in *Karr v. Bermeosolo*, 129 P.3d 88, 90 (Idaho 2005) (citations omitted):

> [42 U.S.C. § 1988] allows courts to award the prevailing party attorney fees in actions seeking to enforce section 1983 claims. Since [plaintiff] Karr has not prevailed on the merits

> of her first amendment claim, she is not entitled to attorney fees. . . . Likewise, [Defendants] . . . are not entitled to attorney fees under 42 U.S.C. § 1988. Prevailing defendants are entitled to attorney fees under this section only where the action is "unreasonable, frivolous, meritless, or vexatious." This Court finds Karr's claims and pursuit of the appeal were not unreasonable, frivolous, meritless, or vexatious, and therefore Respondents are not entitled to attorney fees.

The reasoning in the opinion below departs radically from these prior decisions and does not mention either of them.

Petitioner cited both of these prior decisions in its rehearing request (App. 143-144), and argued that, by refusing to follow them, the court below had not only ignored its own precedent but also "improperly nullified federal law." App. 143. Thus, petitioner's rehearing request gave the court below a clear opportunity to clarify that it had actually applied the *Christiansburg/Hughes* standard – if that was indeed what the court below had done. Because the court denied rehearing without any such clarification or other explanation (App. 133), the court's opinion must be taken at face value, and that opinion on its face declined to follow this Court's decisions in *Christiansburg* and *Hughes*.[1]

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[1] Petitioner is not alone in reading the decision below as one that refuses to abide by this Court's precedent when ruling on respondents' request for attorney's fees under § 1988. That

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2. Certiorari is warranted even under respondents' untenable reading of the opinion below. The Idaho Supreme Court based the fee award against petitioner solely upon its view that petitioner's excessive-force claims were "clear[ly]" barred by qualified immunity. App. 55-56. Respondents defend the award on the same ground. Br. in Opp. 21-22. But the availability of a qualified-immunity defense, standing alone, is not a proper basis for a fee award against a plaintiff under § 1988, even if the availability of that defense seems clear in hindsight.

Qualified immunity has the purpose and effect of protecting officials even from meritorious constitutional claims. This is illustrated by the cases in which this Court has upheld qualified immunity for officials who have violated the plaintiff's constitutional rights. *E.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2378-2383 (2014) (holding that plaintiff's firing violated First Amendment, but defendant had qualified immunity from individual-capacity claims); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (holding that strip search of public school student violated Fourth Amendment, but defendant schools officials were "nevertheless protected from liability through qualified immunity"); *Wilson v. Layne*, 526 U.S. 603, 605-606 (1999) (holding that officers violated Fourth

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reading is also adopted by a leading treatise. *See* 2 Steven H. Steinglass, Section 1983 Litigation in State Courts § 22:12 (Dec. 2015) (text accompanying notes 8.25, 8.50 & 8.75) (Westlaw citation: 2 Section 1983 Litigation in State Courts § 22:12).

Amendment by inviting media representatives inside a private home to view execution of arrest warrant, but officers had qualified immunity from liability). These cases demonstrate that the availability of a qualified-immunity defense, standing alone, does establish that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Hughes*, 449 U.S. at 14. When a court rules that a defendant has qualified immunity, that ruling signifies that the defendant did not violate the plaintiff's *clearly established* rights; the ruling does not, however, necessarily mean that the defendant did not violate the plaintiff's rights *at all*.

As respondents emphasize (Br. in Opp. 21), the court below determined that the availability of qualified immunity to respondents was "clear" when petitioner took her appeal. App. 55-56. But the court's determination rested solely on three Ninth Circuit decisions (App. 34), as do respondents (Br. in Opp. 18-20). As discussed in our petition, the Idaho Supreme Court ignored Ninth Circuit precedent holding that the use of a police dog to subdue a suspect can constitute unconstitutional excessive force. Pet. 36 (citing *Smith v. City of Hemet*, 394 F.3d 689, 700-704 (9th Cir. 2005) (en banc), *cert. denied*, 545 U.S. 1128 (2005)). Furthermore, just because the law is clearly established by case law within a circuit – or among multiple circuits, for that matter – that does not mean the law is correct, in the absence of a definitive ruling by this Court. *See Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013) ("Disagreeing with the lower federal courts is not the same as ignoring federal

law."). Finally, it would distort the adversarial process to interpret § 1988 to allow fee awards against plaintiffs whose claims are found, in hindsight, to be clearly barred by qualified immunity. That interpretation would deter plaintiffs from asserting valid constitutional claims, and could consequently retard the development of constitutional law. *Cf. Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (recognizing law-development benefits, in certain circumstances, of courts deciding whether defendant's conduct violated constitutional rights before deciding whether defendant has qualified immunity).

This case illustrates the potential chilling effect of the Idaho Supreme Court's approach, under which fees could be awarded against civil rights plaintiffs under § 1988 if their claims were found to be clearly barred by qualified immunity. In the decision below, the Idaho Supreme Court did not rule on the merits of petitioner's excessive-force claims. Instead, the court only addressed whether respondents violated "clearly established" rights. App. 14; *see also* App. 57 (Jones, Jim J., specially concurring) ("Because we hold that qualified immunity supported the dismissal on summary judgment of James' claim under 42 U.S.C. § 1983, it was not necessary to consider the merits of that claim."). The one member of the Idaho Supreme Court who did address the merits, J. Jim Jones, concurred specially to explain why, in his view, "there were triable issues of fact that would have precluded summary judgment" on petitioner's excessive-force claim. App. 57. J. Jim Jones' opinion leaves no doubt that he did not find petitioner's claim "meritless

in the *Christiansburg* sense." *Hughes*, 449 U.S. at 15. Because the majority awarded fees against petitioner under § 1988 without ruling on the merits of her claim and without disputing J. Jim Jones' analysis, its decision implies that fees were appropriate even assuming that respondents violated her constitutional rights. That implication cannot be squared with this Court's decisions construing § 1988.

Immediately above, we have argued that the Idaho Supreme Court would have been wrong to rely solely on respondents' qualified immunity as a basis for finding petitioner's appeal "meritless in the *Christiansburg* sense," *Hughes*, 449 U.S. at 15, and such reliance cannot be squared with this Court's precedent. But it bears repeating that this argument addresses a hypothetical ruling that – in reality and contrary to respondents' interpretation of the decision below – the Idaho Supreme Court did not make. In reality, the Idaho Supreme Court did not follow *Christiansburg* and *Hughes* because the court did not think it had to. Its error is so apparent, petitioner submits, that summary reversal is appropriate in the event that this Court deems plenary consideration unwarranted. *E.g.*, *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam).[2]

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[2] Respondents ask this Court to deny the petition or, alternatively, "to remand the case to the Idaho Supreme Court for that court to apply the 'frivolous, unreasonable and without foundation' attorneys fee standard." Br. in Opp. 22. We are

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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aware of no authority that permits this Court to remand a case properly before it on a petition for certiorari under 28 U.S.C. § 1257(a), without first having granted the petition and vacated the judgment below. *See* 28 U.S.C. § 2106. Moreover, this case does not seem appropriate for disposition by a "GVR" order. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (stating that GVR order is "potentially appropriate" where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation"). The decision below rests on the same error that the Oklahoma Supreme Court committed in *Nitro-Lift*, 133 S. Ct. 500: namely, the erroneous view that this Court's decisions interpreting federal statutes do not bind state courts. Accordingly, in our view the petition for certiorari in the present case warrants the same disposition as the petition for certiorari in *Nitro-Lift*.